BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KAYE CANNON JOINES Claimant VS. **OLATHE MEDICAL CENTER** Respondent AND **PHICO INSURANCE COMPANY** Insurance Carrier	)	Docket No. 206,635

ORDER

Respondent and insurance carrier appeal from a preliminary hearing Order dated April 2, 1996, wherein Administrative Law Judge Alvin E. Witwer granted claimant benefits.

ISSUES

The issue as raised by respondent and insurance carrier in their Application for Appeals Board Review is stated as whether:

> "The Administrative Law Judge exceeded his authority and jurisdiction by failing to dismiss this action in accordance with the request by the respondent and insurance carrier pursuant to K.S.A. § 44-518."

The Appeals Board would restate the issues as follows:

(1) Did claimant unreasonably refuse to submit to an examination?

(2) If so, did the Administrative Law Judge exceed his jurisdiction by failing to suspend payment of compensation and/or dismiss the proceedings?

(3) Does the Appeals Board have jurisdiction to review this preliminary order?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board must first determine whether it has jurisdiction to review this appeal from a preliminary hearing order. The Order dated April 2, 1996, from which respondent appeals, deals solely with the issues of medical treatment and temporary total disability compensation. K.S.A. 1995 Supp. 44-551(b)(2)(A), states in pertinent part:

> "If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing."

K.S.A. 44-534a(a)(2) clearly grants authority to the Administrative Law Judge to make a preliminary award of temporary total disability compensation. That statute further makes provision for the jurisdiction of the Appeals Board to review preliminary hearing orders:

> "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board."

Respondent contends that the claimant failed to cooperate with recommended psychiatric treatment by failing to attend her scheduled appointment with Dr. Rosalyn Inniss. Respondent terminated claimant's temporary total disability compensation and it appears that respondent also terminated medical treatment due to claimant's refusal to attend scheduled appointments with Dr. Inniss. It is respondent's position that claimant's claim must be dismissed. In support of its position, respondent cites K.S.A. 44-518 which provides:

> "If the employee refuses to submit to an examination upon request of the employer as provided for in K.S.A. 44-515 and amendments thereto or if the employee or the employee's health care provider unnecessarily obstructs or prevents such examination by the health care provider of the employer, the employee's right to payment of compensation shall be suspended until the employee submits to an examination and until such examination is completed. No compensation shall be payable under the workers compensation act during the period of suspension. If the employee refuses to submit to an examination while any proceedings are pending for the purpose of determining the amount of compensation due, such proceedings shall be dismissed upon showing being made of the refusal of the employee to submit to an examination."

K.A.R. 51-9-5 is also pertinent to the issue. It reads:

> "An unreasonable refusal of the employee to submit to medical or surgical treatment, where the danger to life would be small and the probabilities of a permanent cure great, will justify denial or termination of compensation beyond the period of time the injured worker would have been disabled had he or she submitted to an operation but only after a hearing as to the reasonableness of such refusal.
>
> "The penalty provided for the refusal to submit to an examination will be rigidly enforced. There shall be the utmost co-operation between the parties throughout to ascertain the true facts."

Respondent contends that the Administrative Law Judge exceeded his authority and jurisdiction because once there is a finding that claimant unreasonably refused to submit to medical treatment the statute is mandatory and leaves the Administrative Law Judge no discretion but to dismiss the action. Therefore, the Administrative Law Judge's failure to dismiss the action means that the preliminary order is subject to review by the Appeals Board. We disagree.

The April 1, 1996 preliminary hearing was held pursuant to claimant's Form E-3, Application for Preliminary Hearing, seeking temporary total disability compensation and medical treatment. It is not clear whether the Administrative Law Judge considered respondent's motion to dismiss to be before him.

In the Administrative Law Judge's Order, there is no mention of respondent's motion to dismiss pursuant to K.S.A. 44-518. Neither is there any finding with regard to whether claimant refused to submit to an examination. At page 8 of the Transcript of the Preliminary Hearing held April 1, 1996 the Court states:

> "Well, there's no motion to dismiss on file today and I don't know whether she refused to go or not but we'll take that up in the testimony.
>
> "Unless there's anything further of an introductory nature, Mr. Eppright is free to proceed."

The closest the court comes to ruling on respondent's motion is found at page 55, lines 6-14 of the Transcript of Preliminary Hearing where the Court states:

> "I'll prepare the necessary order following this hearing. This is essentially what it will contain. It appears that the claimant is just determined to control the medical treatment and I can understand her position because it's her body. Our compensation system doesn't exactly work that way."

Respondent did not file a motion to dismiss. Instead, K.S.A. 44-518 was raised orally at the preliminary hearing as a defense to the claimant's request for preliminary benefits. It can be inferred from the Administrative Law Judge's granting benefits that respondent's motion to dismiss was denied.

As shown, K.S.A. 44-518 provides alternative sanctions for a claimant's failure to submit to medical examination. Benefits can be suspended or, if the refusal occurs while proceedings are pending for the determination of compensation due, such proceedings can be dismissed. We do not find that such proceedings were pending at the time of claimant's refusal. The examination with Dr. Inniss was initially set for July 11, 1995. By letter of that same date from respondent's counsel to claimant's counsel, claimant was instructed to call Dr. Inniss and reschedule the appointment. Subsequently, on July 19, 1995 a letter was directed to claimant by respondent's counsel informing her that she had until July 21, 1995 to reschedule an appointment with Dr. Inniss or "all benefits under the Kansas Workers' Compensation Act will be terminated pursuant to K.S.A. § 44-518. That means you will be supplied no medical treatment or temporary total disability compensation benefits until you comply with this medical examination obligation." However, claimant did not file a claim for compensation and Application for Hearing until November 21, 1995. Thus, in July 1995 there were no "proceedings . . . pending for the purpose of determining the amount of compensation due . . . ." Accordingly, the sanction of dismissal is not available.

Another argument for the Appeals Board having jurisdiction to review the preliminary order is that under K.S.A. 44-534a(a)(2) claimant's alleged refusal to submit to a medical examination constitutes a "certain defense." Our jurisdiction to review this Order would thereby turn upon what is meant by "certain defense." Unfortunately, the statute provides

little guidance. The Appeals Board does not find that there exists a category of defense to workers compensation claims known as "certain defenses." Rather, the phrase "certain defenses" is analogous to *some* defenses as opposed to *any* defense or *all* defenses. The word "certain" as used in K.S.A. 44-534a is intended to limit the type and character of defenses which can be said to give rise to Appeals Board jurisdiction. For insight into the certain type of defenses contemplated by the statute, we must look to the other issues specified in K.S.A. 44-534a which, if disputed, are considered jurisdictional. They include: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; and (3) whether notice is given or claim timely made. What these jurisdictional issues have in common is that they all go to the compensability of the claim. In other words, for a workers compensation claim to be compensable each and every one of the issues listed, if disputed, must be proven by a claimant before he or she can recover any benefits under the Workers Compensation Act. The Appeals Board has previously held, and hereby reaffirms the proposition that the certain kind of defenses contemplated by K.S.A. 44-534a(a)(2) are defenses which go to the compensability of the claim. Examples of these type of defenses would be an allegation of willful failure to use a guard or the intoxication defense.

The defense raised by the respondent herein, if successful, could result in a dismissal or could "justify denial or termination of compensation beyond the period of time the injured worker would have been disabled had he or she submitted to an operation [or treatment]." K.A.R. 51-9-5. Thus, the defense of an unreasonable refusal by an employee to submit to medical or surgical treatment, if successful, does not result in a finding that the claim is not compensable but rather can result in a cessation of benefits. Even with such a finding, a claimant may still be entitled to benefits previously ordered or that predate the applicability of the defense. In addition a respondent would not be entitled, for example, to reimbursement from the Workers Compensation Fund for medical or temporary total disability benefits previously provided under K.S.A. 44-534a(b) under circumstances where benefits are cut off pursuant to K.S.A. 44-518 and/or K.A.R. 51-9-5. Furthermore, a finding pursuant to K.S.A. 44-518 and K.A.R. 51-9-5 that an employee has unreasonably refused to submit to medical treatment such that compensation should be terminated is an interlocutory order which can be altered or rescinded based upon a change of circumstances or otherwise upon a rehearing of the matter. *See* Chippeaux v. Western Coal and Mining Co., 124 Kan. 475, 260 Pac. 625 (1927). As stated previously, such a finding does not go to the ultimate question of the compensability of the claim, but instead to the issue of claimant's entitlement to ongoing or future benefits. These examples all support a finding that, unlike the defenses alleging intoxication or a willful failure to use a guard, the provisions of K.S.A. 44-518 and K.A.R. 51-9-5 do not constitute a defense which should be considered jurisdictional and subject to review by the Appeals Board on an appeal from a preliminary order.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the appeal of respondent and its insurance carrier should be, and is hereby, dismissed and the Order of Administrative Law Judge Alvin E. Witwer dated April 2, 1996 remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of July 1996.

BOARD MEMBER

c: Frank D. Eppright, Kansas City, MO

Jeffrey S. Austin, Overland Park, KS
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director